Supreme Court, U. S.
FILED
MAR 10 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1397

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,

v.

GREYHOUND COMPUTER CORPORATION,
Respondent.

CONDITIONAL MOTION FOR LEAVE TO FILE PETITION AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 10, 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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CONDITIONAL MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF CERTIORARI

Petitioner International Business Machines Corporation ("IBM") has this date filed a petition for a writ of certiorari under 28 U.S.C. § 1254(1) to the Court of Appeals for the Ninth Circuit seeking review of an order entered on February 1, 1980, denying IBM's petition for permission to appeal pursuant to 28 U.S.C. § 1292(b). In the event this Court considers that this case was not "in" the court of appeals within the meaning of Section 1254(1), IBM respectfully hereby moves for leave to file the annexed petition for a writ of certiorari

under 28 U.S.C. § 1651(a) to review the above-referenced order of that court.

Respectfully submitted,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

International Business Machines Corporation ("IBM") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the court of appeals (App. A) is not reported. The memorandum, order and certification of the district court (App. B) are not reported.

JURISDICTION

The order of the court of appeals, denying IBM's petition for permission to appeal pursuant to 28

U.S.C. § 1292(b) on the ground that the issue of law raised by the petition had been resolved by the Ninth Circuit in *In re U.S. Financial Securities Litigation*, 609 F.2d 411 (9th Cir. Dec. 10, 1979), was entered on February 1, 1980. This Court has jurisdiction to issue the prayed-for writ under 28 U.S.C. § 1254(1)[1] or 28 U.S.C. § 1651(a).

In this petition, IBM invokes the jurisdiction of this Court pursuant to Section 1651(a), in the event that the Court considers that the case was not "in" the court of appeals within the meaning of Section 1254(1). *House v. Mayo*, 324 U.S. 42 (1945); *In re 620 Church Street Building Corp.*, 299 U.S. 24 (1936); 9 *Moore's Federal Practice* ¶ 110.27, at 299 (2d ed. 1975); Rule 30 of the Rules of the Supreme Court of the United States. Should the Court further be of the view that the writ of certiorari ought properly to be directed to the District Court for the District of Arizona, IBM hereby requests that the Court treat this petition as a prayer to direct a writ of certiorari to that court.

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[1] IBM has today filed a petition for a writ of certiorari which invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). IBM submits that the fact that the court of appeals has considered the merits of the question presented in denying IBM's petition to appeal has "brought the case within any reasonable purpose of the requirement [of Section 1254(1)] that it be *in* the court." C. Wright & A. Miller, *Federal Practice and Procedure* § 4036, at 13 (1978) (emphasis added). This Court has, therefore, jurisdiction under Section 1254(1) to issue a writ of certiorari to the court of appeals. *Tidewater Oil Co. v. United States*, 409 U.S. 151 (1972).

QUESTION PRESENTED

Whether a federal district court has the authority under the Constitution to strike a jury demand in a case of such complexity that the court cannot reasonably expect a jury to comprehend the evidence and the law.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

IBM hereby incorporates the "Statutory and Constitutional Provisions Involved" as set forth in its petition for a writ of certiorari pursuant to Section 1254(1).

STATEMENT

IBM hereby incorporates the "Statement" set forth in its petition for a writ of certiorari pursuant to Section 1254(1).

REASONS FOR GRANTING THE WRIT

IBM hereby incorporates the statement of "Reasons for Granting the Writ" set forth in its petition for a writ of certiorari pursuant to Section 1254(1).

CONCLUSION

This case raises an issue of unusual importance for the administration of justice in the federal courts. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 10, 1980

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-8301

D.C. No. Civ. 72-242 WPC Arizona (Phoenix)

GREYHOUND COMPUTER CORPORATION,
Plaintiff/Respondent,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendant/Petitioner.

ORDER

Before: HUG and PREGERSON, Circuit Judges

Upon due consideration, the court issues the following order:

(a) Pillsbury, Madison & Sutro's motion for leave to file an amicus curiae brief is granted;

(b) respondent's motion for reassignment of panel is denied; and

(c) the petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is denied.

The issue of law raised by the petition has been definitively resolved in this circuit, *In re United States Financial Securities Litigation*, slip op. at 1186 (9th Cir. December 10, 1979).

Filed Feb. 1, 1980
RICHARD H. DEANE
Clerk,
U.S. Court of Appeals

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 72-242 Phx. WPC

GREYHOUND COMPUTER CORPORATION,
Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendant.

MEMORANDUM AND ORDER AND
CERTIFICATE

This complex case is set February 5, 1980 [now May 1, 1980] for retrial which the Court estimates will take a minimum of three months and probably more like four if tried to a jury as demanded by plaintiff. Defendant has moved to strike the jury demand so that the case may be tried to the Court. Plaintiff opposes.

This is an antitrust case involving sophisticated, highly technical and difficult questions of economics, technology and law. It is a complex case by any definition. Trial to the Court would substantially shorten the trial and avoid the very real danger of a hung jury and a third trial or more.

While the Court believes the current status of the law requires this Court to deny the motion to strike

the jury, this view is not unanimous. *See Zenith Radio Corp. v. Matsushita Electric Ind. Co., Ltd.*, [1979-2] Trade Cases (CCH), ¶ 62,753 (E.D. Pa. June 6, 1979), and ¶ 62,893 (E.D. Pa. August 21, 1979). The Court is informed that the question is currently before the Ninth Circuit. *See In re U.S. Financial Securities Litigation* M.D.L. No. 161 (9th Cir. petition for review granted August 29, 1977), *appealing* 76 F.R.D. 702 (S.D. Cal. 1977).

IT IS ORDERED:

The motion to strike the jury demand is denied for lack of authority to grant said motion.

CERTIFICATE

Pursuant to 28 U.S.C. § 1292(b), this Court certifies that the question as to whether this Court has the authority to strike the jury demand in a case such as this involves a controlling question of law as to which there is substantial ground for difference of opinion with respect to that question and immediate appeal may materially advance the ultimate termination of the litigation. *See* Judge Becker's opinion in *Zenith Radio Corp. v. Matsushita Electric Ind. Co., Ltd.*, [1979-2] Trade Cases (CCH), ¶ 62,893 (E.D. Pa.), dated August 21, 1979.

DATED November 6, 1979.

/s/ Wm. P. Copple
United States District Judge